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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

In re:	Case No. 96-02095
HIPWELL, TERRY,	**THE AMALGAMATED SUGAR CO.'S OBJECTION AND MEMORANDUM IN OPPOSITION TO LAND VIEW FERTILIZER'S MOTION FOR RELIEF FROM AUTOMATIC STAY**
Debtor.	

COMES NOW The Amalgamated Sugar Company, LLC., a secured creditor of the above-named Debtor, by and through its counsel of record Penland Munther Boardman, Chartered and hereby objects to the motion brought by Land View Fertilizer, Inc. for relief from the automatic stay to allow the parties in interest to proceed with the action now pending in the Third Judicial District of the State of Idaho in and for the County of Canyon, Case No. 98-02828 -- Land View Fertilizer, Inc., Plaintiff v. The Amalgamated Sugar Company, LLC, Defendant.

This opposition is based upon the grounds that the claims in issue in the state court action constitute determinations of the validity, extent or priority of liens with respect to the property of the estate within the jurisdiction of this honorable Bankruptcy Court under the provisions of 28 U.S.C. § 157 and that said determinations are *res judicata* by reason of the Order for Relief from Automatic Stay and Approving Setoff in favor of The Amalgamated Sugar Company, LLC, entered by this Court on April 18, 1997. In support of this objection, The Amalgamated Sugar

Company, LLC, relies upon the arguments presented below and the Affidavit of Richard C. Boardman.

INTRODUCTION

During the pendency of the above-captioned bankruptcy action, Land View Fertilizer, Inc. (Land View) filed a state court action in the Third Judicial District of the State of Idaho, in and for the County of Canyon, Case No. 98-02828. A true copy of the state court Complaint is appended to the Affidavit of Richard C. Boardman as Exhibit A. The claims asserted in the state court action are for a determination of the validity, extent or priority of liens with respect to property of the debtor as between Land View and The Amalgamated Sugar Company, LLC. (Amalgamated). Both are creditors of Mr. Hipwell. The property at issue consists of crop proceeds which were due to Hipwell from Amalgamated.

However, the Bankruptcy Court has already made a final disposition of these same crop proceeds in favor of Amalgamated by its Order for Relief from Automatic Stay and Approving Setoff entered April 18, 1997. A true copy of the Order is appended to the Affidavit of Richard C. Boardman as Exhibit B. The Bankruptcy Court Order predated the filing of the state court action by more than one year. As will be demonstrated in the legal arguments below, the Order of the Bankruptcy Court was a final order, the claims asserted in the state court action are *res judicata* and the time for relief from the Order has expired. Further, because of the pending bankruptcy case and the character of the claims, the Bankruptcy Court, not the state court, has jurisdiction.

These issues were raised and argued in the state court action on cross motions for summary judgment. The state court entered an Order staying any further activity in that action "until such time as the Bankruptcy Court lifts the automatic stay to permit this Court to proceed." Land View now moves for "Relief from Automatic Stay."

STATEMENT OF FACTS

The subject matter of the state court lawsuit is a dispute of lien priorities between Land View and Amalgamated. Both parties had business dealings with a farmer, Terry Hipwell, who is the bankruptcy debtor, having filed a Chapter 12 Petition in or about September 1996. Land View sold fertilizer and other agricultural chemicals to Hipwell, for his farming operations. Amalgamated entered into agreements with Hipwell to purchase his sugar beet crops, and in connection with those agreements, made loans to Hipwell to finance his farming expenses.

In February, 1997, the debtor, Terry Hipwell, brought a motion in Bankruptcy Court demanding the turnover of the sum of $25,293.24 in crop proceeds which he alleged were the property of the estate. Amalgamated argued that it was entitled to set off the $25,293.24 against the debt owed to it by Hipwell.

Following the argument of Hipwell's turnover motion, the Bankruptcy Court issued a Memorandum of Decision. A true copy of the Memorandum of Decision is appended to the Affidavit of Richard C. Boardman as Exhibit C. The Memorandum of Decision denied Hipwell's turnover motion. The Court concluded that Amalgamated had a right of set off but that that right of set off had not yet been exercised:

> However, from the evidence it appears that TASCO [Amalgamated] has not effected a setoff, nor violated the automatic stay, by withholding payment of the final installment. *Citizens Bank of Maryland v. Stumpf*, _____ U.S. _____, 116 S.Ct. 286, 289 (1995). However, under *Stumpf*, TASCO is admonished to formally request relief from the stay promptly in order to exercise its right to setoff.

Memorandum of Decision, p. 12.

The Memorandum of Decision was limited to the motion before the Court. It did not deal with the setoff: "Counsel for TASCO may submit an appropriate form of order denying Debtor's Motion for Turnover and Objection to Claim as the same relates to the proceeds from the Payette and Owyhee County beet crops." Memorandum of Decision, p. 17.

Toward the end of the Memorandum of Decision, the Bankruptcy Court included a section entitled "Issues Not Resolved by this Decision." The introduction to this section states:

"There are several potential issues discussed by the parties in their pleadings and at the hearing on Debtor's Motion and Objection that are not finally resolved by this decision." The Court listed several issues not relevant here, then said: "Finally, the Court was informed that TASCO and Land View Fertilizer entered into certain subordination or similar agreements regarding the parties' respective rights in Debtor's crops. Any disputes arising from those agreements are likewise matters saved for another day." Memorandum of Decision, pp. 16, 17 (emphasis added).

Eight days later, Amalgamated filed its Motion for Relief From Automatic Stay and for Set Off. A true copy of the Motion for Relief From Automatic Stay and for Set Off is appended to the Affidavit of Richard C. Boardman as Exhibit D. A copy of the motion was served on Land View. A notice of hearing for the motion was also served on Land View. A true copy of the Notice of Hearing is appended to the Affidavit of Richard C. Boardman as Exhibit E. Land View did not contest Amalgamated's motion, and the Bankruptcy Court entered its Order for Relief From Automatic Stay and Approving Setoff (Exhibit B). As will be demonstrated below, as a matter of law, entry of the order was a final adjudication of Amalgamated's right to the $25,293.24. This is the same $25,293.24 for which Land View now attempts to make a belated claim in the state court action.

LEGAL ARGUMENT

The doctrine of Res Judicata precludes Land View from asserting the claims set forth in the state court action.

As noted in the Statement of Facts, the claims asserted by Land View in the state action all relate to a dispute of lien priorities between Land View and Amalgamated. The Debtor, Terry Hipwell, is in bankruptcy.

The correct forum for the resolution of a lien priority dispute over the assets of a bankruptcy debtor is the Bankruptcy Court. Under federal law, the Bankruptcy Court is granted

specific jurisdiction over the resolution of all "core proceedings" which expressly include a dispute of lien priorities between creditors. 28 U.S.C. § 157, provides in pertinent part as follows:

> [B]ankruptcy judges may hear and determine all cases under Title 11 and all core proceedings arising under Title 11. . .and may enter appropriate orders and judgments, subject to review under § 158 of this Title. . . .[C]ore proceedings include. . .determinations of the validity, extent, or priority of liens. . ..

See also, In re: *Tacoma Boat Building Co.*, 81 B.R. 248, 251 (Bkrtcy. S.D.N.Y. 1987).

In the Bankruptcy Court, the appropriate time for resolution of the lien priority dispute was the return date of Amalgamated's Motion to Lift Stay and Allow Setoff. That Motion was brought and heard on full notice to Land View through its counsel of record in the bankruptcy proceedings.

Bankruptcy case law is replete with decisions resolving lien priority disputes between creditors. These specifically include priority disputes between creditors claiming a right of setoff and other priority creditors.

In *Rochelle v. United States*, 521 F.2d 844 (5th Cir. 1975), the dispute was between the trustee of a bankrupt partner and the United States of America which sought to setoff against the claim of the partnership's unpaid federal taxes.

In re: Sound Emporium, Inc., 70 B.R. 22 (W.D. Tex. 1987), provides an even more specific example of the correct procedural course which should have been followed by Land View, but was not. In *Sound Emporium, Inc.*, the United States moved to modify the automatic stay to setoff taxes owed by the debtors against amounts owed to the debtor by the United States Army. The bankruptcy court granted the motion of the United States. Texas Bank & Trust, a secured creditor, appealed the granting of the motion. Herein, Land View should have pursued the same procedural course. Land View's remedy was to contest and/or appeal the order granting Amalgamated's motion to lift stay and allow setoff. Having failed to do so, Land View is now precluded from asserting those claims in a separate state court action.

Idaho case precedent on this point exists in a recent Idaho Supreme Court decision, based on remarkably similar facts. That case was *Farmers National Bank v. Shirey*, 126 Idaho 63 (1994), a declaratory judgment action by the bank to resolve a lien priority dispute between secured creditors of the debtor in bankruptcy. Previously, in the bankruptcy action, the bank had obtained an order lifting the automatic stay:

> In order to expedite liquidation of the collateral still in its possession, the Bank contacted the Allens and the trustee and proposed the execution of stipulations to relieve the Bank from 11 U.S.C. § 362 automatic stay invoked by the Chapter 7 filing. The Bank, the Allens, and the trustee executed and signed the stipulations, which were then submitted to the bankruptcy court for approval on November 23, 1987. The court approved the stipulations, lifting the automatic stay and authorizing the Bank to sell the collateral.
>
> On November 25, 1987, the Bank notified the Shireys of the court's action and the Bank's intention to sell the collateral. The Shireys' attorney during the bankruptcy proceedings, Mr. Decker, admitted having received the notification as well as the stipulations and order at least three weeks before the sale. The Shireys submitted no objection to the sale to the bankruptcy court, nor did the Shireys ever submit their own request for relief from the stay until after the collateral was sold.

Id. at 66.

Thereafter, in the bank's state court action, the Shireys asserted a counterclaim that their security interest was superior to the security interest of the bank and presented various other claims arising out of the same transaction. The district court granted summary judgment dismissing Shireys' counterclaim on grounds of *res judicata*. The supreme court affirmed:

> "The claims contained in the Shireys' third amended counterclaim should have been raised in the bankruptcy court. The bankruptcy proceedings themselves inherently posed the very issue at the heart of the Shireys' counterclaim. The fundamental purpose of a Chapter 7 bankruptcy is to identify the creditors, determine the amounts due, ascertain if the claims are secured or unsecured and their priority, and dispose of the assets of the estate accordingly. *Any claim by the Shireys that their interest was superior to the Bank's or wrongfully denied by the Bank was uniquely addressable to that forum.*"

Id. at 69 (emphasis added).

After a review of federal precedent, the Idaho Supreme Court also ruled that the Bankruptcy Court's order for relief from the automatic stay in favor of the bank was a "final order" for *res judicata* purposes:

> "In this case, the order for relief from the automatic stay in favor of the Bank clearly qualifies as a final order as defined by federal case precedent. Moreover, the central thesis underlying all of the Shireys' claims in the counterclaim was that the Bank's security interest in the collateral was inferior to the Shireys' and by selling the collateral the Bank violated the Shireys' rights. This theory, which challenges the disposition of the security interests made by the bankruptcy court by lifting the stay, is a core matter which could have and should have been resolved by the bankruptcy court. *The Shireys' claim to the collateral* and the counterclaims that the Bank breached an agreement with the Shireys concerning the collateral, wrongfully converted the collateral, and violated the Shireys' rights, *should have been litigated in the bankruptcy court before the Bank was relieved of the stay or, at the very latest, before the Bank sold the collateral and thus are barred under the doctrine of res judicata. The Shireys' avenue for relief leads to the federal district court in the form of an appeal from the bankruptcy court order, not to our doors."*

Id. at 70-71 (emphasis added). *Accord, In re: Kemble*, 776 F.2d 802,805 (9th Cir. 1985); *In re: American Mariner Industries, Inc.*, 734 F.2d 4726,429, (9th Cir. 1984); *Hillyard Farms v. White County Bank*, 52 B.R. 1015, 1017 (D.C. S.D. Ill. 1985).

The bank had previously obtained an order lifting the automatic stay allowing it to liquidate collateral in its possession. The order was entered pursuant to a stipulation signed by the trustee and the debtor's counsel. However, the court held that the Shireys, who were other creditors, slept on their rights. They were bound by the order because they had adequate notice and a reasonable opportunity to contest the order lifting the stay or to appeal it. The order was not only binding on the debtor, it was binding on the Shireys also. 126 Idaho at 71.

If anything, the facts in this case are even more compelling than those in *Shirey*. The order lifting stay entered April 18, 1997 was not based on a stipulation. Rather, it was based on a motion and hearing which were presented on full and legal notice to Land View through its counsel of record in the bankruptcy action. The order issued by the Bankruptcy Court was a

final adjudication of Amalgamated's rights to the $25,293.24 as against all other parties. It is undisputed that Land View had adequate notice of Amalgamated's motion, an opportunity to contest it, and an opportunity to appeal the entry of the order. As with the Shireys, Land View is also bound by the order issued by the Bankruptcy Court. The issue is now *res judicata.*

Land View's present motion is, in effect, a request for relief from the Order for Relief from Automatic Stay and Approving Setoff previously entered in favor of Amalgamated with regard to the crop proceeds. Such relief is governed by the provisions of F.R.C.P. 60(b):[1]

> "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

As noted above, the Order from which Land View now requests relief was entered on April 18, 1997. Land View is not in compliance with the one year limitation stated in the rule. This one year limitation is strictly enforced. Bankruptcy Rule 9006(b)(2) Provides: "The court may not enlarge the time for taking action under Rule . . . 9024." *See also, Re: Childress,* 851 F.2nd 928 (7th Cir. 1988); *United States v. Berenguer,* 821 F.2nd 19 (1st Cir. 1987).

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[1] Bankruptcy Rule 9024 provides as follows: "Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330.

DATED this 4th day of December, 1998.

PENLAND MUNTHER BOARDMAN, CHARTERED

Richard C Boardman

Richard C. Boardman, Of the Firm by FRL
Attorneys for The Amalgamated Sugar Company

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 4th day of December, 1998, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the rules of procedure, to the following persons:

Julie Klein Fischer D. Samuel Johnson White, Peterson, Pruss, Morrow & Gigray P.O. Box 247 Nampa, ID 83653-0247	Hand Delivery U.S. Mail Facsimile Overnight Mail	____ ____ X ____
Howard R. Foley Foley & Freeman, Chartered 77 East Idaho Street P.O. Box 10 Meridian, ID 83680	Hand Delivery U.S. Mail Facsimile Overnight Mail	____ X ____ ____
Office of the U.S. Trustee 304 North Eighth Street, Ste. 347 P.O. Box 110 Boise, ID 83701	Hand Delivery U.S. Mail Facsimile Overnight Mail	____ X ____ ____
United States Trustee Ronald D. Schoen P.O. Box 216 Payette, ID	Hand Delivery U.S. Mail Facsimile Overnight Mail	____ X ____ ____
Terry Hipwell 30932 Shelton Road Parma, ID 83660	Hand Delivery U.S. Mail Facsimile Overnight Mail	____ X ____ ____

Richard C Boardman

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